Thomas Perry d/b/a Perry Steel Company *and* Local 417, International Association of Bridge, Structural and Ornamental Ironworkers, AFL–CIO. Case 3–CA–18161

June 22, 1994

DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND BROWNING

Upon a charge filed by the Union on October 7, 1993, an amended charge filed on November 12, 1993, and a second amended charge filed on November 23, 1993, the General Counsel of the National Labor Relations Board issued a complaint on November 17, 1993, and the Acting General Counsel issued an amendment to complaint on January 7, 1994, against Thomas Perry d/b/a Perry Steel Company, the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the National Labor Relations Act. Although properly served copies of the charge, amended charge and second amended charge, complaint and amendment to complaint,[1] the Respondent failed to file an answer.

On March 9, 1994, the Acting General Counsel filed a Motion for Summary Judgment with the Board. On March 11, 1994, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint and amendment to complaint affirmatively note that unless an answer is filed within 14 days of service, all the allegations in the complaint and amendment to the complaint will be considered admitted. Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Region, by letter dated February 8, 1994, sent by certified and regular mail, notified the Respondent that unless an answer to the complaint and the amendment to the complaint were received by close of business on February 15, 1994, a Motion for Summary Judgment would be filed.[2]

In the absence of good cause being shown for the failure to file a timely answer, we grant the Acting General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent has been owned by Thomas Perry, a sole proprietorship, doing business as Perry Steel Company. At all material times, the Respondent, with its office and principal place of business located at 5 Country Acre Lane, in the Town of Saratoga Springs, New York, has been engaged in the building and construction industry as an iron rebar contractor. During the 12-month period preceding November 17, 1993, the Respondent, in conducting its business operations, derived gross revenues in excess of $50,000, of which an amount in excess of $50,000 was derived from providing services to other enterprises directly engaged in interstate commerce. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondent constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All ironworkers performing certain work within the geographical jurisdiction of the Union as more fully set forth in the collective-bargaining agreement, entered into by the Respondent and the Union on May 17, 1993, effective from May 17, 1993, until June 30, 1993, and extended on July 7, 1993 to April 1994.

On May 17, 1993, the Respondent, an employer in the building and construction industry, without regard to whether the majority status of the Union has ever been established under the provisions of Section 9 of the Act, granted recognition to the Union as the exclusive collective-bargaining representative of the unit and entered into a collective-bargaining agreement with the Union, the term of which was effective from May 17 until June 30, 1993. On July 7, 1993, the collective-

[1] Copies of the charge, second amended charge, complaint, and amendment to complaint were sent by certified mail but were unclaimed. The charge was served on the Respondent by personal service. Copies of the second amended charge, complaint, and amendment to complaint were sent by regular mail and have not been returned. The Respondent's failure to claim certified mail cannot serve to defeat the purposes of the Act. See, e.g., *Michigan Expediting Service*, 282 NLRB 210 fn. 6 (1986). Furthermore, the failure of the Postal Service to return documents served by regular mail indicates actual receipt of those documents by the Respondent. *Lite Flight, Inc.*, 285 NLRB 649, 650 (1987). We conclude that the Respondent was properly served the charge, amended charge, second amended charge, complaint, and amendment to complaint.

[2] The certified letter was unclaimed. The letter sent by regular mail has not been returned by the Postal Service, indicating actual receipt by the Respondent. *Lite Flight, Inc.*, supra.

bargaining agreement was extended until April 1994. For the period of May 17, 1993, to April 1994, based on Section 9(a) of the Act, the Union has been the limited exclusive collective-bargaining representative of the unit.[3]

Since about April 15, 1993, the Respondent has failed and refused to bargain with the Union as the limited exclusive collective-bargaining representative of the employees in the unit, in that the Respondent has ceased to continue in force and effect the collective-bargaining agreement and has unilaterally abrogated, rescinded, and repudiated the collective-bargaining agreement.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has been failing and refusing to bargain collectively with the limited exclusive collective-bargaining representative of its employees, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has ceased to continue in force and effect the collective-bargaining agreement and has unilaterally abrogated, rescinded, and repudiated the collective-bargaining agreement, we shall order the Respondent to honor the terms of the collective-bargaining agreement retroactively to April 15, 1993, and make whole its unit employees for any losses suffered as a result of the unlawful unilateral abrogation, rescission, and repudiation of the agreement, including making contractually required contributions to fringe benefit funds, if any, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). In addition, the Respondent shall reimburse unit employees for any expenses ensuing from its failure to make any required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts and all other backpay owed the employees to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[3] In the absence of any need to determine in this proceeding whether the parties' relationship is governed by Sec. 9 or Sec. 8(f), Member Browning would not reach that issue.

ORDER

The National Labor Relations Board orders that the Respondent, Thomas Perry d/b/a Perry Steel Company, Saratoga Springs, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with Local 417, International Association of Bridge, Structural and Ornamental Ironworkers, AFL–CIO as the limited exclusive collective-bargaining representative of the employees in the unit, by ceasing to continue in force and effect the collective-bargaining agreement and unilaterally abrogating, rescinding, and repudiating the collective-bargaining agreement. The unit includes the following employees:

> All ironworkers performing certain work within the geographical jurisdiction of the Union as more fully set forth in the collective-bargaining agreement, entered into by the Respondent and the Union on May 17, 1993, effective from May 17, 1993, until June 30, 1993, and extended on July 7, 1993 to April 1994.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Honor the terms of the collective-bargaining agreement retroactively to April 15, 1993, and make whole the unit employees for any losses suffered as a result of the unlawful unilateral abrogation, rescission, and repudiation of the agreement, as set forth in the remedy section of this decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its facility in Saratoga Springs, New York, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. June 22, 1994

James M. Stephens, Member

Dennis M. Devaney, Member

Margaret A. Browning, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail or refuse to bargain with Local 417, International Association of Bridge, Structural and Ornamental Ironworkers, AFL–CIO as the limited exclusive collective-bargaining representative of the employees in the unit, by ceasing to continue in force and effect the collective-bargaining agreement and unilaterally abrogating, rescinding, and repudiating the collective-bargaining agreement. The unit includes the following employees:

> All ironworkers performing certain work within the geographical jurisdiction of the Union as more fully set forth in the collective-bargaining agreement, entered into by us and the Union on May 17, 1993, effective from May 17, 1993, until June 30, 1993, and extended on July 7, 1993 to April 1994.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL honor the terms of the collective-bargaining agreement retroactively to April 15, 1993, and WE WILL make whole our unit employees for any losses suffered as a result of our unlawful unilateral abrogation, rescission, and repudiation of the agreement.

THOMAS PERRY D/B/A PERRY STEEL COMPANY